No. 77-610

In the Supreme Court of the United States

OCTOBER TERM, 1977

DON B. HARDING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 563 F. 2d 299.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-16 to A-17) was entered on September 29, 1977. The petition for a writ of certiorari was filed on October 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's extortionate conduct was shown to have affected interstate commerce within the meaning of the Hobbs Act.

STATEMENT

Following a non-jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of two counts of attempting to affect interstate commerce by means of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent terms of six months' imprisonment and two years' probation on each count and was fined $1,000 on each count (Pet. 5). The court of appeals affirmed in a comprehensive opinion (Pet. App. A-1 to A-15).

From August 1975 through April 1976, petitioner served as the executive director of the Tennessee Real Estate Commission, the state agency that administers the qualifying examination for real estate brokers (App. 25-30, 107).[1] The evidence at trial established that during his tenure as executive director petitioner conducted an ongoing scheme to extort money from applicants for broker's licenses in exchange for improperly providing them with examination questions and answers prior to the test (Pet. App. A-2; App. 104-124, 175-177).

Petitioner's attempt to extort money from two of these applicants, Brenda Kaye Johnson and Donald Nasca, formed the basis for the two counts of the indictment. In February 1976, petitioner met with Johnson, who had just failed in her third attempt to pass the examination, and suggested that he could sell her a copy of the questions and answers to the upcoming examination (Pet. App. A-2). Johnson agreed, but then reported the incident to agents of the FBI, who enlisted her aid in investigating petitioner's activities. At a subsequent meeting, petitioner delivered the

[1]"App." refers to the appendix filed by petitioner in the court of appeals.

exam answers to Johnson in exchange for $300 that had been provided by the FBI (*ibid.*). The FBI also asked Donald Nasca, who had twice failed the examination, to assist in the investigation. Nasca agreed to cooperate, and he, like Johnson, sent petitioner a letter requesting assistance in passing the examination (*ibid.*). Petitioner responded by offering to sell Nasca a copy of the exam, and in April 1976 Nasca paid petitioner $300 for the exam (*ibid.*). Both Nasca and Johnson tape recorded the meetings at which they paid petitioner for the examinations (*ibid.*).

ARGUMENT

In *Stirone* v. *United States*, 361 U.S. 212, 215, this Court observed that the broad language of the Hobbs Act, 18 U.S.C. 1951—which proscribes extortion affecting commerce "in any way or degree"—manifests Congress' intention to use the full extent of its constitutional power to punish interference with interstate commerce by extortion, robbery, or physical violence. Against this background, the courts of appeals have consistently ruled that only a minimal effect on interstate commerce need be shown to meet the jurisdictional requirement of the Act. See, *e.g.*, *United States* v. *Hathaway*, 534 F. 2d 386 (C.A. 1), certiorari denied, 429 U.S. 819; *United States* v. *Mazzei*, 521 F. 2d 639 (C.A. 3), certiorari denied, 423 U.S. 1014; *United States* v. *DeMet*, 486 F. 2d 816, 822 (C.A. 7), certiorari denied, 416 U.S. 969.

Petitioner contends that the court of appeals erred in finding that even a minimal effect on interstate commerce resulted from his conduct because the sale of real estate and the licensing of brokers is solely a matter of state—not federal—concern.

However, as the court of appeals correctly concluded (Pet. App. A-5), at least the necessary *de minimis* effect on commerce was established. The government introduced evidence that real estate transactions handled by Tennessee

brokers frequently involve purchasers from other states, including business and commercial investors, that Tennessee brokers advertise real estate in other states, and frequently make long distance telephone calls in the course of business (App. 160-163). One witness testified that brokers often make use of the Inter-Community Relocation Service, which involves real estate companies in every city in the country, and that at least half of the business done by his firm involved people moving to and from other states (App. 158-164). Indeed, this Court has recognized the interstate nature of real estate transactions, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783-785, and Congress has specifically provided for federal regulation of certain land sales in the Interstate Land Sales Full Disclosure Act, 82 Stat. 590, as amended, 15 U.S.C. 1701 *et seq.*[2]

Accordingly, the court of appeals did not err in concluding that petitioner's scheme to extort money from persons who sought to enter the real estate business—but were unable to pass the state licensing test—affected interstate commerce.[3]

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[2]Although, as petitioner emphasizes (Pet. 9-10), the State of Tennessee regulates the licensing of real estate brokers and the sale of real estate within the State, this in no way displaces the federal legislation intended to bar extortion affecting interstate commerce. Petitioner's reliance in this connection on *Robertson* v. *California*, 328 U.S. 440, is misplaced. *Robertson* holds that under certain circumstances, and where Congress has not acted to the contrary, states may regulate activities of importance to the local community even if that activity affects interstate commerce. *Robertson* does not purport to limit the power of the federal government to act to regulate activities affecting commerce, and, of course, nothing in the Hobbs Act prevents the State of Tennessee from regulating real estate brokerage within its borders.

[3]Petitioner directs much of his argument against the rationale of the decision in *United States* v. *Staszcuk*, 517 F. 2d 53, 60 (C.A. 7), certiorari denied, 423 U.S. 837, which held that the jurisdictional element of the Hobbs Act could be satisfied by showing that at the time of the extortionate transaction there existed a "realistic probability" that commerce would be affected, although the completed transaction did not affect commerce. Since the transactions here did have an effect on interstate commerce, *Staszcuk* is distinguishable, and its rationale is not at issue in this case. To the extent that petitioner suggests that his scheme did not actually affect commerce because the FBI intervened and no unqualified brokers actually passed the exam, he ignores the fact that he was convicted of *attempting* extortionate conduct affecting commerce, not of having succeeded in his endeavors (see App. 190-196). In the case of an attempt, the jurisdictional element is satisfied if it is established that, if the criminal plan had been successfully implemented, its natural and probable consequences would have included an effect on commerce. See *United States* v. *Gupton*, 495 F. 2d 550 (C.A. 5); *Anderson* v. *United States*, 262 F. 2d 764, 769-770 (C.A. 8); *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8). That test was clearly met here.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[4]

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JANUARY 1978.

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[4]Petitioner does not raise, and this case does not present, the question now pending before this Court in *United States* v. *Culbert*, No. 77-142, certiorari granted October 3, 1977, *i.e.*, whether conduct within the plain language of the Hobbs Act is nonetheless not proscribed by that Act unless it is also proven to constitute racketeering. The court of appeals held (Pet. App. A-13 to A-14) that petitioner's conduct constituted racketeering, because "[t]he concept of racketeering * * * has long been understood to include the obtaining of property under color of official right * * *."